

LATHAM & WATKINS LLP
Mark S. Mester (*Pro Hac Vice pending*)
mark.mester@lw.com
Kathleen P. Lally (*Pro Hac Vice pending*)
kathleen.lally@lw.com
330 North Wabash Avenue, Suite 2800
Chicago, Illinois 60611
Telephone: (312) 876-7700
Facsimile: (312) 993-9767

LATHAM & WATKINS LLP
David F. Kowalski (CA Bar No. 265527)
david.kowalski@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: (858) 523-5400
Facsimile: (858) 523-5450

Attorneys for Defendant
LEXINGTON LAW FIRM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NATHAN HALE, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

JOHN C. HEATH, Attorney at Law,
PLLC, d/b/a LEXINGTON LAW FIRM,

Defendant.

CASE NO. 3:15-CV-01676-LAB-JMA

CLASS ACTION

**DEFENDANT'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO
COMPEL ARBITRATION**

Judge: Hon. Larry Alan Burns
Courtroom: 9, 2nd Floor
Hearing Date: November 23, 2015
Hearing Time: 11:15 a.m.

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Defendant John C. Heath, Attorney at Law, PLLC, d/b/a/ Lexington Law Firm (“Lexington”) respectfully submits the following memorandum in support of its motion to compel arbitration and dismiss or stay the Complaint filed by Plaintiff Nathan Hale (“Plaintiff”):

I. INTRODUCTION

In requesting a free credit repair consultation from Lexington, Plaintiff expressly consented to being bound by the terms of certain agreements. One of those agreements -- the Terms of Use -- contains an arbitration clause requiring Plaintiff to arbitrate “any claim” between Plaintiff and Lexington, including claims alleging violations of state or federal statutory law. Moreover, this agreement requires arbitration of any disputes regarding the scope of the arbitration provision itself.

As has been repeatedly recognized, both federal and state law strongly favor arbitration in cases such as this, where the Plaintiff has entered into a valid and enforceable agreement to arbitrate and the claims contained in the Complaint clearly fall within the scope of that agreement. In accordance with that strong policy favoring arbitration and in conformance with the arbitration provision to which Plaintiff agreed, Lexington respectfully requests that the Court compel arbitration of Plaintiff’s claims and dismiss or stay this action.

II. RELEVANT FACTUAL BACKGROUND

The factual background relevant to this motion is set forth below. See disc. infra at 1-5.¹

A. Plaintiff Registers With Lexington And Agrees To Its Terms Of Use

On or about March 11, 2015, Plaintiff visited the website web2carz.com, ostensibly seeking information about a car loan. See Declaration of John C. Heath

¹ Unless stated otherwise, all emphasis is supplied and all internal citations and quotations are omitted from any quoted material herein.

1 (“Heath Decl.”), Ex. 1, at ¶¶ 4-5 & Ex. A (web2carz.com screenshots). Upon
 2 submitting his loan request to web2carz.com, Plaintiff was directed to a website
 3 acknowledging that request and further asking if he would like to contact or be
 4 contacted by a representative from Lexington regarding information about credit
 5 repair. See id. at ¶¶ 6-9 & Ex. B (Registration Page) & Ex. C (Plaintiff’s Account)
 6 (showing “Lead Source” as web2carz.com). Plaintiff completed the registration
 7 form, providing his name, email address, mailing address and personal and work
 8 phone numbers and clicked “Get Your Free Consultation.” See id. By seeking his
 9 free consultation, Plaintiff expressly acknowledged that he “agree[d] by electronic
 10 signature to . . . the Privacy Policy and Terms of Use.” See id. at ¶ 10 & Ex. B
 11 (Registration Page).²

12 Indeed, the clause advising Plaintiff that he was agreeing to the Terms of
 13 Use appeared directly above the link Plaintiff was required to click, was in the
 14 same font color and size as the rest of the text on the registration page and included
 15 a highlighted hyperlink to each of the referenced documents, including the Terms
 16 of Use. See Heath Decl., Ex. 1, at ¶ 10 & Ex. B (Registration Page). In no event,
 17 however, would Plaintiff or any member of his proposed class have been able to
 18 register with Lexington over the website and receive a free credit consultation
 19 without first agreeing to the Privacy Policy and Terms of Use. See id. at ¶¶ 10-11

20 ² In full, the acknowledgment provided directly above the link to click to “Get
 21 Your Free Consultation” advises consumers that:

22 By clicking ‘Get Your Free Consultation’ I agree by electronic signature
 23 to: (1) be contacted by Lexington Law Firm about credit repair or credit
 24 repair marketing by a live agent, artificial or prerecorded voice, and SMS
 text at my residential or cellular number, dialed manually or by autodialer,
 and by email (consent to be contacted is not a condition to purchase
 services); and (2) the Privacy Policy and Terms of Use.

25 Heath Decl., Ex. 1, at ¶ 10 & Ex. B (Registration Page). As such, even if
 26 arbitration were not appropriate, Plaintiff’s consent to receive both phone calls and
 27 SMS texts from Lexington seriously calls into question his claim that Lexington
 somehow violated the TCPA. See, e.g., In the Matter of Rules and Regulations
Implementing the Telephone Consumer Protection Act of 1991, 27 F.C.C.R. 1830,
 1843-44 (F.C.C. Feb. 15, 2012) (discussing prior express consent as a complete
 28 defense to TCPA claims).

& Ex. B (Registration Page).³

**B. The Terms Of Use To Which Plaintiff
Agreed Contain An Arbitration Provision**

The Terms of Use to which Plaintiff agreed govern all aspects of Plaintiff's registration with and use of Lexington's services, including use of Lexington's website, requests to be contacted by Lexington regarding credit repair services, participation in Lexington's "Text Message Program" and any engagement of Lexington's legal services. See Heath Decl., Ex. 1, at ¶ 12 & Ex. D (Terms of Use). Moreover, the Terms of Use contain an arbitration agreement, which specifies that it is governed by the Federal Arbitration Act ("FAA") and otherwise states as follows:

BY USING LEXINGTON'S WEBSITE, ENGAGING LEXINGTON'S LEGAL SERVICES, REQUESTING THAT LEXINGTON CONTACT YOU ABOUT ITS CREDIT REPAIR SERVICES, AND/OR PARTICIPATING IN LEXINGTON'S TEXT MESSAGE PROGRAM, YOU AGREE TO ARBITRATE ALL CLAIMS BETWEEN YOU AND LEXINGTON ON AN INDIVIDUAL BASIS ONLY AND NOT AS A PART OF ANY CLASS. A 'CLAIM' IS ANY CASE, CONTROVERSY, DISPUTE, TORT, DISAGREEMENT, LAWSUIT, LEGAL ACTION, OR CLAIM NOW OR HEREAFTER PENDING BETWEEN YOU AND LEXINGTON, INCLUDING BUT NOT LIMITED TO ANY ALLEGED STATE OF FEDERAL STATUTORY VIOLATION, OR ANY DISPUTE OVER THE INTERPRETATION OF THE WEBSITE TERMS OR THE ARBITRABILITY OF ANY CLAIM PURSUANT TO THE WEBSITE TERMS. THIS AGREEMENT TO ARBITRATE GOVERNS ALL PAST, CURRENT AND PROSPECTIVE INTERACTIONS WITH LEXINGTON. YOU AGREE THAT YOU ARE WAIVING ALL RIGHTS TO: (A) A TRIAL BY JURY; (B) PARTICIPATE IN A CLASS ACTION LAW SUIT OR CLASS ACTION ARBITRATION; AND (C) BRING AN ACTION AGAINST LEXINGTON IN A COURT OF LAW. YOU MAY INDIVIDUALLY ARBITRATE ANY CLAIM AGAINST LEXINGTON IN ANY JURISDICTION IN THE UNITED STATES. LEXINGTON WILL REIMBURSE YOU UP TO \$300 OF YOUR ARBITRATION FILING FEE. THE RULES

³ As discussed in more detail below, courts routinely hold that agreements (including arbitration agreements) that a customer agrees to by affirmatively clicking on a dialogue box are valid and enforceable. See, e.g., Hancock v. AT&T, 701 F.3d 1248, 1255-58 (10th Cir. 2012); Swift v. Zynga, 805 F. Supp. 2d 904, 910-12 (N.D. Cal. 2011); disc. infra at 7-8.

1 **OF THE AMERICAN ARBITRATION ASSOCIATION THEN**
 2 **IN FORCE SHALL GOVERN THE ARBITRATION** (provided,
 3 however, that the terms of the Website Terms shall control over any
 4 inconsistency between the Rules of the American Arbitration
 5 Association and the Website Terms). The arbitrator shall have
 6 authority to interpret the Website Terms, including but not limited to
 7 the authority to decide whether any claim is arbitrable under the
 8 Website Terms and to decide issues related to the scope of arbitration,
 the rules of arbitration, the arbitrator's jurisdiction, and the
 enforceability of the Website Terms. You agree that the Website
 Terms involves commerce under 9 U.S.C. §§ 1 et seq. and that this
 Arbitration Clause is governed by federal law, including the Federal
 Arbitration Act. The remainder of the Website Terms is governed by
 the laws of the state of Utah, as provided in Section 17 below.

9 Id. at Ex. D (Terms of Use) (emphasis in original).

10 As can be seen by the foregoing, the arbitration agreement is detailed. See
 11 Heath Decl., Ex. 1, at Ex. D (Terms of Use). Not only does it broadly require
 12 Plaintiff to arbitrate “all claims between [Plaintiff] and Lexington,” but it also
 13 clearly and unambiguously identifies that the arbitration will take place on an
 14 individual (rather than class) basis and that Plaintiff has waived all rights to file a
 15 claim in court, to have a trial by jury and to participate in a class action. See id.;
 16 see also, e.g., Stolt-Nielsen v. Animal Feeds Int’l Corp., 559 U.S. 662, 684-87
 17 (2010) (class arbitration is not permitted in the absence of an express agreement to
 18 arbitrate class claims). It further specifies the governing arbitration rules,
 19 Plaintiff’s financial obligations and that any disputes regarding arbitrability and the
 20 scope of arbitration are delegated to the arbitrator. See Heath Decl., Ex. 1, at Ex.
 21 D (Terms of Use).

22 **C. Despite The Agreement To Arbitrate, Plaintiff Files His Class Complaint**
 23 **In Federal Court And Subsequently Refuses To Arbitrate His Claims**

24 On or about July 28, 2015, Plaintiff filed his Complaint in this Court,
 25 alleging that on March 13, 2015, Lexington called Plaintiff on his cellular
 26 telephone using an automatic telephone dialing system without his prior consent
 27 and purportedly in violation of the Telephone Consumer Protection Act, 47 U.S.C.
 28 § 227 (“TCPA”). See Compl. (Dkt. #1) at ¶¶ 11-19, 32-39. Based on these

1 allegations and without regard to the arbitration agreement or class waiver,
 2 Plaintiff seeks certification of a class of “[a]ll persons within the United States who
 3 received any telephone call from [Lexington] or [its] agent/s and/or employee/s,
 4 not sent for emergency purposes, to said person’s cellular telephone made through
 5 the use of any automatic telephone dialing system and/or with an artificial or
 6 prerecorded message.” See id. at ¶ 21.

7 Lexington was served with Plaintiff’s Complaint on or about August 3,
 8 2015. See Summons (Dkt. #4). Shortly thereafter, Lexington retained counsel,
 9 who immediately began investigating the facts of this case and determined that the
 10 matter was governed by the arbitration agreement. See disc. supra at 1-4.

11 **III. DISCUSSION**

12 There is a strong policy under both federal and Utah law in favor of
 13 arbitration. See, e.g., Davis v. Nordstrom, 755 F.3d 1089, 1092 (9th Cir. 2014);
 14 THI of N.M. v. Patton, 741 F.3d 1162, 1165-66 (10th Cir. 2014); Imperial Sav.
 15 Ass’n v. Lewis, 730 F. Supp. 1068, 1071 (D. Utah 1990).⁴ The strong federal

16 ⁴ Questions regarding the validity and enforceability of an arbitration agreement
 17 are generally governed by state law. See, e.g., United States v. Marubeni Corp.,
 18 592 Fed. Appx. 642, 643 (9th Cir. 2015) (“When determining whether parties have
 19 agreed to submit to arbitration, we apply general state-law principles of contract
 20 interpretation, while giving due regard to the federal policy in favor of arbitration
 21 by resolving ambiguities as to the scope of arbitration in favor of arbitration.”);
 22 Walker v. BuildDirect.com, 733 F.3d 1001, 1004 (10th Cir. 2013) (“Generally,
 23 courts should apply ordinary state-law principles that govern the formation of
 24 contracts to determine whether a party has agreed to arbitrate a dispute.”). As
 25 noted above, the Terms of Use contain a choice of law clause stating that they are
 26 governed by federal law, the FAA and the laws of the State of Utah. See Heath
 27 Decl., Ex. 1, at Ex. D (Terms of Use). As such, Lexington cites herein federal law
 28 with respect to the arbitration clause as well as Utah law to the extent appropriate
 and available. See disc. infra at 5-11. Importantly, however, the ability of state
 law to invalidate an arbitration agreement is limited by the FAA and federal law:

Although [the FAA] provides that a written arbitration agreement
 ‘shall be valid, irrevocable, and enforceable, save upon such
 grounds as exist at law or in equity for the revocation of any
 contract’ . . . it preempts state-law rules that ‘stand as an obstacle
 to the accomplishment of the FAA’s objectives,’ as by
 ‘interfer[ing] with fundamental attributes of arbitration[.]’

Walker, 733 F.3d at 1004-05; see also, e.g., Concepcion, 131 S.Ct. at 1750-53
 (holding that California’s “Discover Bank Rule,” which allowed consumers to

(continued...)

1 policy in favor of arbitration is manifested in the FAA, which, in turn, provides
 2 that an agreement to arbitrate “shall be valid, irrevocable, and enforceable.” 9
 3 U.S.C. § 2; see also THI, 741 F.3d at 1165. In point of fact, the FAA was enacted
 4 by Congress to reverse perceived judicial hostility toward arbitration agreements.
 5 See AT&T v. Concepcion, 131 S.Ct. 1740, 1747 (2011) (“[T]he judicial hostility
 6 towards arbitration that prompted the FAA had manifested itself in ‘a great variety’
 7 of ‘devices and formulas’ declaring arbitration against public policy.”); THI, 741
 8 F.3d at 1165.

9 Accordingly, a party seeking to compel arbitration simply needs to
 10 demonstrate “(1) the existence of a valid, written agreement to arbitrate in a
 11 contract; and (2) that the agreement to arbitrate encompasses the dispute at issue.”
 12 Langston v. 20/20 Cos., 2014 WL 5335734, at *3 (C.D. Cal. 2014); see also
 13 Lamkin v. Morinda Properties, 2012 WL 2913257, at *9 (D. Utah 2012)
 14 (acknowledging substantially the same standard). In addressing a motion to
 15 compel arbitration, however, there is a presumption of arbitrability:

16 [T]here is a presumption in favor of arbitrability; that is, an order
 17 to arbitrate the particular grievance should not be denied unless it
 18 may be said with positive assurance that the arbitration clause is
 not susceptible of an interpretation that covers the asserted dispute.
 Doubts should be resolved in favor of coverage.

19 Sanchez v. Nitro-Lift, 762 F.3d 1139, 1147-48 (10th Cir. 2014) (quoting Local 5-
 20 857 Paper, Allied-Industrial, Chem. & Energy Workers Int’l Union v. Conoco Inc.,
 21 320 F.3d 1123, 1126 (10th Cir. 2003)); see also Mitsubishi v. Soler Chrysler-
 22 Plymouth, 473 U.S. 614, 626 (1985); Marubeni, 592 Fed. Appx. at 643 (courts
 23 must give “due regard to the federal policy in favor of arbitration by resolving
 24 ambiguities as to the scope of arbitration in favor of arbitration.”).

25
 26
 27 (...continued)
 28 demand class arbitration even if not permitted by contract, was inconsistent with
 and preempted by the FAA).

**A. Plaintiff And Lexington Entered
Into A Valid Arbitration Agreement**

As the party seeking to compel arbitration, Lexington “has the burden of demonstrating the existence of an enforceable agreement to arbitrate.” Island Peak Ranch v. FIIK Inv., 2008 WL 2673925, at *9 (D. Utah 2008); see also Langston, 2014 WL 5335734, at *3. Lexington easily satisfies this requirement: the Terms of Use contain a clear and unambiguous agreement to arbitrate all claims between Plaintiff and Lexington. See Heath Decl., Ex. 1, at Ex. D (Terms of Use); disc. infra at 9-11. This arbitration agreement is clearly marked in capitalized and bolded letters that begin on the first page of the Terms of Use. See Heath Decl., Ex. 1, at Ex. D (Terms of Use); see also Kilgore v. KeyBank, 718 F.3d 1052, 1059 (9th Cir. 2013) (holding that an arbitration clause that was in its own section and bold faced was valid and enforceable); Morales v. Cont’l Fin., 2009 WL 2579093, at *2-3 (D. Utah 2009) (compelling arbitration and noting that the agreement in bold letters and conspicuously marked was validly formed). Plaintiff affirmatively agreed to the Terms of Use -- including the arbitration agreement -- when he registered to receive a free consultation from Lexington on its website. See Heath Decl., Ex. 1, at Ex. B (Registration Page) & Ex. D (Terms of Use).

Notably, courts repeatedly hold that similar “clickwrap” or “click-through” arbitration agreements are valid and have routinely compelled arbitration based upon those agreements.⁵ See, e.g., Hancock, 701 F.3d at 1256-58 (affirming the district court’s dismissal based upon an arbitration clause in a clickwrap agreement and noting that “[c]lickwrap agreements are increasingly common and ‘have routinely been upheld’”); Swift, 805 F. Supp. 2d at 910-12 (enforcing an arbitration agreement contained in a clickwrap agreement when the plaintiff “was

⁵ “Clickwrap is a commonly used term for agreements requiring a computer user to consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with [a] . . . transaction.” Hancock, 701 F.3d at 1255.

provided with an opportunity to review the terms of service in the form of a hyperlink immediately under the ‘I accept’ button” that plaintiff clicked); Crawford v. Beachbody, 2014 U.S. Dist. LEXIS 156658, at *8-9 (S.D. Cal. 2014) (enforcing a choice of law clause in a modified clickwrap agreement where the hyperlinked terms and conditions appeared above the “Purchase” button); see also, e.g., Day v. Microsoft, 2014 WL 243159, at *2-3 (W.D. Wash. 2014) (clickwrap agreement was enforceable when “Plaintiff had to accept the terms of the Windows 8 Pro agreement by checking an ‘I accept the license terms’ box and then by clicking on an ‘Accept’ button before accessing the product”); Sherman v. AT&T, 2012 WL 1021823, at *3 (N.D. Ill. 2012) (compelling arbitration of a clickwrap agreement, noting that the plaintiff had reasonable notice of the terms when he had to click that he agreed to them prior to the transaction).

As Judge Jackson of the District of Colorado aptly observed, arbitration agreements that are entered into electronically have become the norm and are fully enforceable:

We live in an electronic age. It is commonplace these days to enter into agreements electronically . . . plaintiffs had a reasonable opportunity to access the Subscriber Agreement had they wished to do so. They received repeated instructions to do so as well as warnings that by enrolling in the Program they were agreeing to be bound by the terms and conditions of the program. They accepted the benefits of the Price for Life Program, and I conclude that they are bound by the arbitration and class action waiver terms.

Vernon v. Qwest, 925 F. Supp. 2d 1185, 1191 (D. Colo. 2013). This logic applies with equal force to this case: Plaintiff was made aware that his registration with Lexington was governed by the Terms of Use. See Heath Decl., Ex. 1, at Ex. B (Registration Page) & Ex. D (Terms of Use). Plaintiff affirmatively accepted those Terms of Use, and therefore, Plaintiff is bound by them. See, e.g., Hancock, 701 F.3d at 1256-58; Swift, 805 F. Supp. 2d at 910-12.⁶

⁶ Courts also routinely grant motions to compel arbitration of cases asserting claims for alleged violations of the TCPA. See, e.g., Fischer v. Rent-A-Center, (continued...)

B. This Dispute Plainly Falls Within The Scope Of The Arbitration Agreement And In Any Event, Any Disputes Regarding The Scope Of Arbitration Are Delegated To The Arbitrator

Both federal law and Utah law strongly favor arbitration and manifest these policies by resolving all disputes regarding the scope of an arbitration agreement in favor of arbitration. See, e.g., Sanchez, 762 F.3d at 1147-48; Mariposa v. United Shipping Solutions, 295 P.3d 1173, 1177 (Utah App. Ct. 2013) (“[I]f there is any question as to whether the parties agreed to resolve their disputes through arbitration or litigation . . . we interpret the agreement keeping in mind our policy of encouraging arbitration. It is the policy of the law in Utah to interpret contracts in favor of arbitration[.]”) (quoting Central Florida Invs., Inc. v. Parkwest Assocs., 2002 UT 3, ¶ 16 (Utah 2002)); disc. supra at 5-6. The arbitration agreement in this case is broad and encompasses “all claims between [Plaintiff] and Lexington,” including any claims that “allege[] state or federal statutory violation.” See Heath Decl., Ex. 1, at Ex. D (Terms of Use); see also, e.g., Steigerwalt v. Terminix, 246 F. Appx. 798, 801 (3d Cir. 2007) (holding that an arbitration agreement requiring arbitration of “all claims” was broad).

The claims made by Plaintiff in the Complaint undoubtedly fall within the scope of this agreement. See Compl. (Dkt. #1) at ¶¶ 11-19, 32-39; Heath Decl., Ex. 1, at Ex. D (Terms of Use). Plaintiff alleges that he and members of a proposed class received unsolicited calls and/or text messages to their cellular telephones from Lexington and that these messages violated the TCPA, notwithstanding the fact that Plaintiff had consented to receiving calls and text messages from Lexington. See Compl. (Dkt. #1) at ¶¶ 11-19, 21, 32-39. These

(...continued)

2014 WL 3729553, at *1, 6 (E.D. Cal. 2014) (granting motion to compel arbitration in case involving the TCPA); Koyoc v. Progress Fin., 2014 WL 1878903, at *4-7 (C.D. Cal. 2014) (same); Moore v. T-Mobile, 2013 WL 6645011, at *1 (2d Cir. 2013) (affirming grant of motion to compel arbitration in a TCPA case).

1 allegations are plainly a “claim” alleging a violation of federal law -- namely, the
 2 TCPA -- between Plaintiff and Lexington. See id.; Heath Decl., Ex. 1, at Ex. D
 3 (Terms of Use). Moreover, the allegedly unsolicited call was also plainly related
 4 to Plaintiff having registered with Lexington for a free consultation regarding
 5 credit repair, as the call makes clear that Lexington was specifically calling with
 6 respect to Plaintiff’s request for credit repair services. See Heath Decl., Ex. 1, at
 7 ¶ 13 & Ex. E (Call Transcript).

8 Accordingly, Plaintiff’s allegation that he received an “unsolicited” call to
 9 which he did not consent is inextricably linked to his registration for free credit
 10 repair consultation with Lexington and his providing his cellular telephone number
 11 through that process. Compare Compl. (Dkt. #1) at ¶¶ 11-19 (alleging that
 12 Plaintiff received an unsolicited call for which he did not provide consent), with
 13 Heath Decl., Ex. 1, at Ex. D (Terms of Use) (agreeing to arbitrate “all claims”
 14 between Plaintiff and Lexington), and id. at Ex. B (Registration Page) (providing
 15 Plaintiff’s telephone number and consent to receive phone calls). Given the
 16 breadth of the arbitration agreement, however, it certainly cannot be said with
 17 “positive assurance” that there is no interpretation of the agreement that would
 18 encompass this dispute. See Sanchez, 762 F.3d at 1147-48; Sherman v. RMH,
 19 2014 WL 30318, at *8-9 (S.D. Cal. 2014). Quite to the contrary, Plaintiff quite
 20 clearly agreed to arbitrate disputes such as this. See Heath Decl., Ex. 1, at Ex. D
 21 (Terms of Use); disc. supra at 9-10.

22 In any event, any disputes regarding the scope of the arbitration agreement
 23 would themselves be subject to arbitration:

24 The arbitrator shall have the authority to interpret the [Terms of
 25 Use], including but not limited to the authority to decide whether
 26 any claim is arbitrable under the [Terms of Use] and to decide issues
 related to the scope of arbitration, the rules of arbitration, the
 arbitrator’s jurisdiction, and the enforceability of the [Terms of Use].

27 Heath Decl., Ex. A, at Ex. D (Terms of Use). Thus, even if there were some
 28 question regarding whether this dispute falls within the scope of the arbitration

1 agreement (and Lexington respectfully submits that there is not), that question
 2 should be resolved by the arbitrator. See, e.g., Rent-A-Center v. Jackson, 561 U.S.
 3 63, 68-69 (2010) (“We have recognized that parties can agree to arbitrate
 4 ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to
 5 arbitrate or whether their agreement covers a particular controversy.”); Oracle v.
 6 Myriad, 724 F.3d 1069, 1072 (9th Cir. 2013) (arbitrability may be decided by the
 7 arbitrator if there is clear evidence of the parties’ agreement to allow him or her to
 8 do so); Moss v. McLucas, 2013 WL 1680483, at *3, 6 (S.D. Cal. 2013)
 9 (compelling arbitration and holding that the arbitration agreement required
 10 questions of arbitrability to be determined by the arbitrator).

11 Because Lexington has shown the existence of a valid arbitration agreement
 12 and that this matter falls within the scope of that agreement, its motion to compel
 13 arbitration should be granted, and this matter should be dismissed or stayed. See
 14 disc. supra at 5-11.

15 IV. CONCLUSION

16 For the reasons set forth above, Lexington respectfully requests that this
 17 Court enforce the arbitration agreement in its agreement with Plaintiff and grant its
 18 motion to compel arbitration. Lexington further requests that the Court dismiss or
 19 stay these proceedings and grant any other relief the Court deems appropriate.
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1 Dated: September 30, 2015

Respectfully submitted,

2 LATHAM & WATKINS LLP

3 By: /s/ David F. Kowalski

4 david.kowalsk@lw.com

5 LATHAM & WATKINS LLP

6 Mark S. Mester (*Pro Hac Vice pending*)

7 mark.mester@lw.com

8 Kathleen P. Lally (*Pro Hac Vice pending*)

9 kathleen.lally@lw.com

330 North Wabash Avenue, Suite 2800

Chicago, Illinois 60611

Telephone: (312) 876-7700

10 Facsimile: (312) 993-9767

11 LATHAM & WATKINS LLP

12 David F. Kowalski (CA Bar No. 265527)

david.kowalski@lw.com

12670 High Bluff Drive

13 San Diego, California 92130

Telephone: (858) 523-5400

14 Facsimile: (858) 523-5450

15 Attorneys for Defendant

16 John C. Heath, Attorney at Law, d/b/a

Lexington Law Firm

EXHIBIT 1

1 LATHAM & WATKINS LLP
Mark S. Mester (*Pro Hac Vice pending*)
2 mark.mester@lw.com
Kathleen P. Lally (*Pro Hac Vice pending*)
3 kathleen.lally@lw.com
330 North Wabash Avenue, Suite 2800
4 Chicago, Illinois 60611
Telephone: (312) 876-7700
5 Facsimile: (312) 993-9767

6 LATHAM & WATKINS LLP
David F. Kowalski (Ca. Bar No. 265527)
7 david.kowalski@lw.com
12670 High Bluff Drive
8 San Diego, California 92130
Telephone: (858) 523-5400
9 Facsimile: (858) 523-5450

10 Attorneys for Defendant
LEXINGTON LAW FIRM
11

12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 NATHAN HALE, Individually and on
Behalf of Themselves and All Others
15 Similarly Situated, Plaintiff,
16 v.
JOHN C. HEATH, Attorney at Law
17 PLLC, d/b/a LEXINGTON LAW FIRM,
18 Defendant.

CASE NO. 3:15-CV-01676-LAB-JMA

CLASS ACTION

**DECLARATION OF JOHN C.
HEATH**

19 I, John C. Heath, hereby declare and state as follows:
20

21 1. I am over the age of 18 and competent to be a witness herein. All
22 statements in this Declaration are true and correct to the best of my knowledge and
23 belief and, unless state otherwise herein, are based upon my personal knowledge,
24 review of relevant and available documents and discussions with other relevant
25 individuals.

26 2. During the time period relevant to this case, I was Directing Attorney
27 and responsible for the management of Lexington Law Firm ("Lexington").

28 3. Lexington performs consumer advocacy services to correct errors

1 listed on consumers' credit reports. Clients find Lexington in a variety of different
2 ways, one of which is by completing a web registration form that may be accessed
3 through the websites of internet advertisers.

4 4. On or about March 11, 2015, Plaintiff Nathan Hale ("Plaintiff")
5 visited the website web2carz.com, ostensibly seeking information about a car loan.

6 5. Attached hereto as Exhibit A is a true and correct copy of the screen
7 shots from web2carz.com, which are identical in all material respects to the
8 web2carz.com website at the time that Plaintiff visited it.

9 6. Upon submitting his loan request to web2carz.com, Plaintiff was
10 directed to a website acknowledging that request and further asking if he would
11 like to contact or be contacted by a representative from Lexington regarding
12 information about credit repair.

13 7. Plaintiff completed the registration form with Lexington, providing
14 his name, email address, mailing address and personal and work phone numbers
15 and clicked "Get Your Free Consultation."

16 8. Attached hereto as Exhibit B is a true and correct copy of the
17 registration page for Lexington found on web2carz.com, which is identical in all
18 material respects to the registration page on web2carz.com at the time that Plaintiff
19 registered with Lexington and requested a free consultation.

20 9. Attached hereto as Exhibit C is a true and correct copy of documents
21 reflecting all interactions between Plaintiff and Lexington.

22 10. By seeking his free consultation, Plaintiff expressly acknowledged
23 that he "agree[d] by electronic signature to . . . the Privacy Policy and Terms of
24 Use." The clause advising Plaintiff that he was agreeing to the Terms of Use
25 appeared directly above the link Plaintiff was required to click, was in the same
26 font color and size as the rest of the text on the registration page and included a
27 highlighted hyperlink to each of the referenced documents, including the Terms of
28

1 Use.

2 11. Plaintiff would not have been able to register with Lexington over the
3 website and receive a free credit consultation without first agreeing to the Privacy
4 Policy and Terms of Use.

5 12. Attached hereto as Exhibit D is a true and correct copy of the Terms
6 of Use, which are identical in all material respects to the Terms of Use at the time
7 Plaintiff registered with Lexington and requested a free consultation.

8 13. Attached hereto as Exhibit E is a true and correct transcript of the call
9 placed by Lexington to Plaintiff.

10 I declare under penalty of perjury under the laws of the United States that
11 the foregoing is true and correct.

12 Executed on September 29, 2015 in North Salt Lake City, Utah.

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14 
15 John C. Heath
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EXHIBIT A

Car Shopping
Used & New
Cars

Car Reviews
Car Research

Auto Features
Read the latest in everything
autos

AUTOSITE

FORD EXPLORER CLEARANCE

Massive Ford Explorer Price Cuts Now!

GET STARTED

Throwback Thursday:
Celebrating Four
Generations of Toyota
Supra

Live Out Your 007
Fantasies with the Aston
Martin DB9 GT Bond
Edition

The Africa Twin: Is
Honda's new
"Adventure" Bike the
Return of a Classic?

Recall Roundup: Jeep
Windshield Wipers and
Harley-Davidson Fuel
Issues

Autos

Used Cars

New Cars

Honda

Accord

Zip Code

25 miles

Search

Car Loans

Car Insurance

Car Warranty

Car Research

Used Cars

Car Reviews

2015 BMW X6M
Review
Absolutely
ludicrous.

2015 Dodge
Durango R/T
Blacktop AWD
Big and brawny, fast
and roomy.

2015 Volkswagen
Golf GTI S Review
The ur-hot-hatch
continues to impress
the hell out of us.

2015 Mustang
EcoBoost Premium
Review
The semi-practical
Mustang is still full of
fun.

Behind the Wheel

2015 Toyota
Corolla S Plus
The perfect
vehicle to
transport you

2015...

2015 Ford

2016 Kia Sorento

The Daily Driver

Our auto journalists give daily impressions of the cars they drive.

2015
Volkswagen
Golf

Features

Auto Galleries

Auto Tech

Autos 101

Autospeak

Bang For Your Buck

Green Auto

Lists

Most Popular

New Releases

Opinion

CAR PORN

Lists

Jeeps Traveling the World
#CarPorn

The most beautiful landscapes, featuring a car.

For those of you who like to drool over ridiculously good-looking cars, you are not alone. Car Porn is Web2Carz.com's weekly series where we bring you 10 swoon-worthy automobiles every Wednesday that will always be

Land Rover Is Leading the Way in See-Through Technology

Invisible trailers and cargo-monitoring will keep your horses safe.

Invisibility is definitely high on most people's Top 5 Superpowers I Want list; it's a power that has obsessed mankind since the time of Plato. But despite decades of investigation by Hollywood special effects people, true invisibility

Exhibit 1-A

6

Car Shopping
Used & New
Cars

Car Reviews
Car Research

Auto Features

Read the latest in everything
autos

Get The
Auto Loan
You Need Today

All Credit Welcome
 99% Acceptance
 Free & Secure
Application

Car Loans

Auto Financing For Any Credit • New & Used Car Loan • Auto Refinance

Good or Bad Credit
Car Loans

Zip

Select Loan Type:

Used (Dealer)

Estimate Your Credit:

Fair

* Not Sure? See
your FREE Credit
Score

Go

Finance a new
or used vehicle today.

Refinance
your existing auto loan
and save.

We have partnered with
nationally recognized
lenders and dealerships
to help find the right
loan for you.

Finance Overview

New Auto Loans

Looking for a new car? Get the [car loan](#) you need for the vehicle you want! Our lending and dealership partners offer competitive rates and a variety of loan terms to choose from. Financing is available, even if you have less than perfect credit.

Used Auto Loans (Dealer)

Even if you have less than perfect credit, get the loan you need for the vehicle you want! Our dealership partners offer competitive rates and a variety of loan terms.

Used Auto Loans (Private Party)

Buy from the auto classifieds, a neighbor, a friend, eBay... Get pre-approved and know how much you can buy. [Private Party loans](#) are only available to consumers with good to excellent credit.

Refinance Auto Loans

Lower your monthly payments. Get extra cash. Pay off other bills. Save hundreds of dollars over the life of your loan by refinancing with a great rate. Start saving with your next payment. [Refinance loans](#) are available to consumers with good credit, bad credit, or no credit.

Canada Car Loans

We have partnered with the leading lenders & dealers in Canada to provide special finance Canada auto loans. [Click here for Canada car loans.](#)

Car Finance

Car Loans

Bad Credit Car Loans

Auto Refinance

Canada Car Loans

Free Credit Score

AUTOSITE

FORD EXPLORER
CLEARANCE

Massive Ford Explorer Price Cuts Now!

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Car Shopping

New Cars

Used Cars

Photo Lot

Car Insurance

Car Warranty

Dealer Search

Read Car Reviews

Car Videos

Car Information Search

Auto Galleries

Auto Tech

Autos 101

Contact

About Us

Editorial Team

Exhibit 1-A

7

Car Shopping
Used & New
Cars

Car Reviews
Car Research

Auto Features
Read the latest in everything
autos

Get The
Auto Loan
You Need Today

All Credit Welcome

99% Acceptance

Free & Secure Application

Great News!

Car loan coverage found in Bountiful, UT

Final Step

First Name

Last Name

Address

City

State

Zip

Primary Contact Phone

Email

How long at this address? 1 Years

Rent or own? ☒ Rent ☐ Own

Monthly Payment 0

Date of birth

(Note: must be 18 or older)

Social Security #

Employer Name

Job Title

How Long with this employer 1 Years

Monthly Income Monthly Income

(All sources, before taxes. Note: usual minimum is \$1,800)

Bankruptcy in the last 7 years? ☐ Yes ☒ No

Cosigner available (if needed)? ☒ Yes ☐ No

☒ Yes, I want to receive information and offers from email-web2carz.com & Web2Carz.

☐ Considering filing for bankruptcy? Yes, I would like to be contacted by a local bankruptcy attorney for a free consultation.

By submitting this form, you certify that all of the statements in this application are true and complete and are made for the purpose of obtaining credit. You authorize the Web2Carz Network to share your application and related information with its lending partners in order to complete the processing of this application. You authorize the Web2Carz Network and its lending partners to retain and rely on your application and to access your credit report in order to evaluate your credit application. In addition, you acknowledge that you have read and agree to the Web2Carz privacy policy and terms of use. By submitting this form, you are providing express written consent to Web2Carz.com and its third party associates to contact you at the phone number provided via live, prerecorded or autodialed calls and understand that consent is not a condition of purchase. Furthermore, you authorize Web2Carz Network's third party lending institutions to share information in your application, and any other credit information they obtain, with other third parties who may be able to offer or arrange for a direct loan and/or dealer financing.

Get Car Loan

Why fill this out?

It's free • No commitment to buy • No hidden fees • No spam

99% Acceptance Rate

Response In Minutes

Nationwide Coverage

Bad Credit & Bankruptcy Specialists

Free & No Obligation Quote

To refinance your current car loan click here

Apply by Phone

1-888-603- 2 CAR

(1-888-603-2227)

Utah Counties:

Beaver Box Elder Cache Carbon Daggett Davis

Duchesne Emery Garfield Grand Iron Juab Kane

Millard Morgan Piute Rich Salt Lake San Juan Sanpete

Sevier Summit Tooele Uintah Utah Wasatch

Washington Wayne Weber

Privacy:

We are here to provide you with a car loan service. We will not send you any unsolicited email.

Security:

We use the latest encryption technology available for commercial use to pass your information between our system and our lender Network. Security of your personal information is very important to us and our Car Loan partners.

After you submit this Bountiful, UT car loan form, you will be presented with your car loan options and interest rates.

Remember this is a free car loan service and there is no obligation.

Learn more about our finance process • Faq

Car Shopping
Used & New
Cars

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Car Research

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Read the latest in everything
autos

Get The
Auto Loan
You Need Today

All Credit Welcome

99% Acceptance

Free & Secure Application

Thank you for submitting your loan request.
Your application will be processed shortly. If accepted,
you will be contacted by a member of our network.

Interested in purchasing a used car?
[Click here to find a car in your area.](#)

**Start to Repair Your Credit and Help
Raise Your Credit Score Today**
- Get your free credit repair consultation
Call 1-855-255-0370

Fill out this form to have a representative call you

First Name

Last Name

Email

Address

City

State

Zip

Personal Tel

Work Tel

By clicking "Get Your Free Consultation" I agree by electronic signature to: (1) be contacted by Lexington Law Firm about credit repair or credit repair marketing by a live agent, artificial or prerecorded voice, and SMS text at my residential or cellular number, dialed manually or by autodialer, and by email (consent to be contacted is not a condition to purchase services); and (2) the [Privacy Policy](#) and [Terms of Use](#).

A representative will contact you within 24 hours at (801) 456-4566 for your free no obligation consultation!

Get Your Free Consultation

* This is not a debt consolidation, loan or credit card offer. This is a request for a free credit repair consultation.

Buying a Car?
Know your credit score

Get all 3
Credit Scores
7-Day Free Trial

See Your Scores Now

• Auto Galleries
• Auto Tech

• Contact
• About Us

Exhibit 1-A

9

EXHIBIT B

Car Shopping
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Car Reviews
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Auto Features
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autos

Get The
Auto Loan
You Need Today

All Credit Welcome
 99% Acceptance
 Free & Secure Application

Thank you for submitting your loan request.
Your application will be processed shortly. If accepted,
you will be contacted by a member of our network.

Interested in purchasing a used car?
[Click here to find a car in your area.](#)

**Start to Repair Your Credit and Help
Raise Your Credit Score Today**
- Get your free credit repair consultation
Call 1-855-255-0370

Fill out this form to have a representative call you

First Name

Last Name

Email

Address

City

State

Zip

Personal Tel

Work Tel

By clicking "Get Your Free Consultation" I agree by electronic signature to: (1) be contacted by Lexington Law Firm about credit repair or credit repair marketing by a live agent, artificial or prerecorded voice, and SMS text at my residential or cellular number, dialed manually or by autodialer, and by email (consent to be contacted is not a condition to purchase services); and (2) the [Privacy Policy](#) and [Terms of Use](#).

A representative will contact you within 24 hours
at (801) 456-4566 for your free no obligation consultation!

Get Your Free Consultation

* This is not a debt consolidation, loan or credit card offer. This is a request for a free credit repair consultation.

Buying a Car?
Know your credit score
Get all 3
Credit Scores
7-Day Free Trial

See Your
Scores
Now

Auto Galleries

Auto Tech

Contact

About Us

Exhibit 1-B

11

EXHIBIT C



Thank you for submitting your loan request.

Your application will be processed shortly. If accepted, you will be contacted by a member of our network.

 **Interested in purchasing a used car?**
[Click here to find a car in your area.](#)

**Start to Repair Your Credit and Help
Raise Your Credit Score Today**

- Get your free credit repair consultation

Call 1-855-255-0370

Fill out this form to have a representative call you

First Name
 Last Name
 Email
 Address
 City
 State
 Zip
 Personal Tel
 Work Tel

By clicking "Get Your Free Consultation" I agree by electronic signature to: (1) be contacted by Lexington Law Firm about credit repair or credit repair marketing by a live agent, artificial or prerecorded voice, and SMS text at my residential or cellular number, dialed manually or by autodialer, and by email (consent to be contacted is not a condition to purchase services); and (2) the [Privacy Policy](#) and [Terms of Use](#).

**A representative will contact you within 24 hours
at (XXX) XXX-XXXX for your free no obligation consultation!**

Get Your Free Consultation

* This is not a debt consolidation, loan or credit card offer. This is a request for a free credit repair consultation.



EXHIBIT D

[Sign Up](#)

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BY USING LEXINGTON'S WEBSITE, ENGAGING LEXINGTON'S LEGAL SERVICES, REQUESTING THAT LEXINGTON CONTACT YOU ABOUT ITS CREDIT REPAIR SERVICES,

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The Website gives users information about Lexington's credit repair services, general educational and informational resources about credit, and the ability to sign up for and engage Lexington's services.

3. Engagement of Lexington's Services

You are not required to engage Lexington's services in order to visit and read material on the Website; however, you will need to engage Lexington's services if you want it to assist you in your efforts to improve your credit reports and rating. If you engage Lexington, you agree to provide accurate and complete information. You must be legally capable to enter into contracts. It is your responsibility to make any updates to that information. Each engagement is

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9. Representations

You represent and warrant to us that (a) you are legally capable to enter into contracts, (b) you are providing us at all times true, accurate and up to date information about yourself, (c) you will comply at all times with the Website Terms and applicable law and (d) your use of the Website and any transactions that you make with us will not violate the rights of any third party.

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To the extent the State Bar Rules in your jurisdiction require us to designate a single attorney responsible for the Website, Lexington designates John C. Heath, located at 360 North Cutler Drive, North Salt Lake, Utah 84054, as the attorney responsible for the Website. Lexington

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EXHIBIT E

Hale/Lexington Phone Call

Hale: Hello.

Lexington: Hi, this is Linda. I'm a paralegal with the Lexington Law firm. We were giving you a call because you recently requested some information on our firm's credit repair, wanted to call *to see if you had any questions*.

Hale: I, I . . . hold on, stop, stop--I didn't request any -- [I just filed] bankruptcy. I just discharged *[recording cuts off]*